(5)

No. 04-971

In The Supreme Court of the United States

SERRA CANYON COMPANY, LTD,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District, Division Two

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL MEDEIROS
State Solicitor General
TOM GREENE
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOHN A. SAURENMAN
Supervising Deputy Attorney General
*ROSANA MIRAMONTES
Deputy Attorney General
Counsel of Record
300 South Spring Street, Ste. 1702
Los Angeles, California 90013
Telephone: (213) 897-2693
Fax No.: (213) 897-2801
Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a landowner that knowingly acquired property that was subject to an irrevocable offer to dedicate land for public access that its predecessor in interest voluntarily recorded in 1983 may claim that an agency's acceptance of the offer of dedication in 2002 constitutes a "taking" where the landowner's predecessor failed to challenge the permit condition requiring the offer of dedication and where both landowners have enjoyed the benefits of the permit for the past twenty-two years?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	6
I. THE PETITION SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION RESTS ON ADEQUATE STATE LAW GROUNDS	6
A. This Court Will Not Review State Court Decisions Which Rest Upon Separate, Adequate And Independent State Law Grounds	6
B. The Court of Appeal's Decision Is Based on California Law Barring a Landowner from Collaterally Attacking a Permit Condition Where the Original Permittee Failed to Bring a Timely Action Challenging the Condition	7
C. The Court of Appeal's Decision Is Also Based on California's Law of Waiver	8
D. Serra Cannot Avoid the Application of These State Law Principles by Arguing That the Offer of Dedication Required by the 1981 Permit Condition Would Not Meet the Standards Contained in *Nollan*	9

TABLE OF CONTENTS – Continued

Page

II. EVEN IF IT IS NOT BARRED ON INDEPENDENT STATE LAW GROUNDS, SERRA'S PETITION SHOULD BE DENIED 11

A. Serra's Petition Does Not Require the Court to Resolve a Conflict Among the Lower Courts 11

B. Serra's Petition Does Not Present An Important Issue of Federal Law 12

C. Serra's Taking Claim Is Without Merit 14

D. Serra's Ripeness Argument Is Without Merit 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

California Coastal Comm'n v. Superior Court ("Ham") 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (Cal.App. 1989) ..... *passim*

City of Santee v. Superior Court, 228 Cal.App.3d 713, 279 Cal.Rptr. 22 (Cal.App. 1991) 9

County of Imperial v. McDougal, 19 Cal.3d 505, 564 P.2d 14, 138 Cal.Rptr 472 (Cal.), *app. dismissed*, 434 U.S. 944 (1977) 8

Daniel v. County of Santa Barbara, 288 F.3d 375 (9th Cir. 2002), *cert. denied*, 537 U.S. 973 (2002) 2, 11, 12, 15, 16

Dolan v. City of Tigard, 512 U.S. 374 (1994) 10, 13

Federated Department Stores v. Moitie, 452 U.S. 394 (1981) 10

Grupe v. California Coastal Comm'n, 166 Cal.App.3d 148, 213 Cal.Rptr. 578 (Cal.App. 1985) 16

Herb v. Pitcairn, 324 U.S. 117 (1945) 6

Hensler v. City of Glendale, 8 Cal.4th 1, 876 P.2d 1043, 32 Cal.Rptr.2d 244 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995) 7, 13, 17

Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 245 Cal.Rptr. 658 (1988) 10

Leroy Land Development Co. v. Tahoe Regional Planning Agency, 939 F.3d 696 (9th Cir. 1991) 11, 13

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 17

Murdock v. Memphis, 87 U.S. 590 (1875) 6

TABLE OF AUTHORITIES – Continued

Page

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) ..... *passim*

Ojavan Investors Inc. v. California Coastal Com., 26 Cal.App.4th 516 (1994) ..... *passim*

Palazzolo v. Rhode Island 533 U.S. 606 (2001) 6, 18, 19

Paschall v. Christie-Stewart, 414 U.S. 100 (1973) 6

Palo Alto Town and Country Village, Inc. v. BBTC Co., 11 Cal.3d 494, 521 P.2d 1097 113 Cal.Rptr. 705 (Cal. 1974) 15

Patrick Media Group, Inc. v. California Coastal Com., 9 Cal.App.4th 592 (1992) 5, 7, 13

Pfeiffer v. City of La Mesa, 69 Cal.App.3d 74, 137 Cal.Rptr. 804 (Cal.App. 1977) 9

Rossco Holdings, Inc. v. State of California, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (Cal.App. 1989), *cert. denied*, 494 U.S. 1080 (1990) ..... *passim*

State of California v. Super. Ct. (Veta), 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497 (Cal. 1974) 7

Warner Bros. Pictures v. Brodel, 31 Cal.2d 766, 192 P.2d 949 (Cal.), *cert. denied*, 335 U.S. 944 (1948) 16

STATUTES

28 U.S.C. § 1257 2

Cal. Pub. Resources Code § 30801 ..... 7, 8

INTRODUCTION

In this petition, Serra Canyon Company, Ltd ("Serra") seeks to avoid the legal obligation to provide public access that its predecessor in interest voluntarily assumed in 1983 when it obtained a coastal development permit to expand a mobile home park. Serra requests that the Court review the decision of a California court of appeal rejecting Serra's claim that the California State Coastal Conservancy's acceptance of the irrevocable offer of dedication nineteen years later constituted a "taking." As the California court of appeal noted in its opinion, "Serra is not the first property owner to attempt a belated inverse condemnation action years after the Commission issues a conditional [coastal development] permit." Pet. App. 6a. Serra's petition presents no important federal questions and should be denied:

- The California court's decision rests on adequate and independent state law grounds because, under California law, the doctrines of res judicata and waiver bar a successor landowner from collaterally attacking permit conditions where the predecessor landowner did not challenge the permit condition but instead voluntarily complied with the permit condition and accepted the benefits of the permit. *See, e.g., California Coastal Comm'n v. Superior Court ("Ham")*, 210 Cal.App.3d 1488, 258 Cal.Rptr 567, (1989); *Rossco Holdings, Inc. v. State of California ("Rossco")*, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (1989), *cert. denied*, 494 U.S. 1080 (1990).

- Even if the lower court's decision is treated as the disposition of a federal claim, the petition should be denied. There is no conflict among the courts because both state and federal courts have found that a landowner may

not collaterally attack an offer of dedication required as a permit condition after the statute of limitations has expired and where the landowner has obtained the benefits of the permit. *E.g.*, *Ham,* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567; *Daniel,* 288 F.3d 375.

• Even putting aside that Serra's taking claim is barred by res judicata and waiver, Serra's taking claim based on the Conservancy's acceptance of the irrevocable offer is meritless because it is based on a misunderstanding of California law regarding property dedications. Once a landowner records an irrevocable offer of dedication, the landowner has conveyed away its ability to exclude the public upon acceptance of the offer. Serra, as a successor in interest, has no greater property rights than what its predecessor conveyed to it. *See Ojavan Investors v. California Coastal Comm'n ("Ojavan Investors")*, 26 Cal.App.4th 516, 528, 32 Cal.Rptr. 103, 111 (1994), *cert. denied,* 513 U.S. 1148 (1995). Because Serra's predecessor had no right to object to the Conservancy's acceptance of the irrevocable offer of dedication, neither did Serra.

Serra's petition for writ of certiorari should be denied.

JURISDICTION

This Court lacks jurisdiction under Article III of the United States Constitution and 28 U.S.C. section 1257 to review the judgment of the California court of appeal because that decision is based on adequate and independent state law grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Serra Canyon's petition for a writ of certiorari fails to present any federal question because the California state courts decided this case on adequate and independent state law grounds.

STATEMENT OF THE CASE

In 1981, the Adamson Companies ("Adamson"), predecessor in interest to Serra, applied for and obtained a coastal development permit from the California Coastal Commission ("Commission") to authorize development on Adamson's mobile home park in Malibu. Pet. App. 2a. On April 14, 1981, the Commission approved a permit authorizing the addition of 22 mobile home spaces to the existing 281-space mobile home park. *Ibid.* The proposed spaces averaged 2,200 square feet each or a total of 48,400 square feet.

In order to offset the impacts of the proposed development on coastal resources, the permit contained a prior-to-issuance condition that provided Adamson with a choice. It could choose to record an irrevocable offer to dedicate an open space easement prohibiting additional development on another coastal property or it could elect to comply with the condition Adamson itself had proposed to record an irrevocable offer to dedicate in fee 100 feet of unimproved oceanfront property located between Malibu Road and the Pacific Ocean for public recreation and other public purposes. This unimproved oceanfront property is located within a few miles of the mobile home property. Pet. App. 2a. Adamson was required to satisfy the condition

before the permit issued. Given the choice, Adamson in December of 1983 chose to adopt its own proposal and to record the irrevocable offer to dedicate in fee the subject property. Pet. App. 2a. After Adamson complied with the permit condition, the Commission issued the permit and Adamson constructed the authorized development. Adamson did not challenge the permit condition. Pet. App. 2a.

On December 18, 1992, Serra acquired the subject property. Serra took title by quitclaim deed from Adamson as part of a settlement of a lawsuit, which arose from the dissociation of an Adamson partner. Pet. App. 2a. Serra acquired title to the subject property with full legal notice of the obligations and burdens that ran with the land.

On August 8, 2002, the California State Coastal Conservancy ("Conservancy") adopted a resolution authorizing the acceptance of the offer of dedication, and announced its intention to record its acceptance. Pet. App. 2a.

On August 28, 2002, more than 20 years after the Commission approved the permit and 10 years after Serra acquired the subject property, Serra sued the Commission, the Conservancy and the Executive Director of the Conservancy, Sam Schuchat ("State Defendants"). Pet. App. 2a. It sought to challenge the validity of the recorded offer to dedicate, prevent the acceptance of the offer to dedicate and to rescind and extinguish its obligations under the terms of the 1981 permit. Serra asserted, among other claims, that the offer to dedicate permit condition amounted to an unconstitutional taking in violation of the takings clauses of the state and federal Constitutions. Pet. App. 2a-3a.

On November 19, 2002, the trial court sustained the State Defendants' general demurrer to the First Amended Complaint without leave to amend on the grounds that each cause of action was barred by the statute of limitations and the doctrine of waiver. Pet. App. 3a. The trial court entered judgment on the State Defendants' general demurrer and dismissed the First Amended Complaint with prejudice. *Ibid.*

On June 15, 2004, the court of appeal rejected Serra's claims and affirmed the trial court's judgment. Pet. App. 1a-11a. It found that all of Serra's claims were barred by the Coastal Act's 60-day statute of limitations and the waiver doctrine. *Ibid.* The court of appeal relied on a series of California cases that have consistently held that a landowner may not collaterally attack a permit condition after the statute of limitation has run and may not object to the application of the waiver doctrine after having accepted the benefits of the permit. *Ojavan Investors,* 26 Cal.App.4th 516, 32 Cal.Rptr. 103; *Patrick Media Group, Inc. v. California Coastal Com.* ("*Patrick Media*"), 9 Cal.App.4th 592, 11 Cal.Rptr.2d 824 (1992); *Rossco,* 212 Cal.App.3d 642, 260 Cal.Rptr. 736; *Ham,* 210 Cal.App.3d 1488, 258 Cal.Rptr. 567. The court also relied on *Daniel,* 288 F.3d 375, which represents the federal courts' concurrence with these California cases. These cases all stand for the proposition that the time to challenge permit conditions starts when the permit is approved, not when the permit conditions are exercised.

The court of appeal's decision also adopted the Ninth Circuit's conclusion in *Daniel* that the *acceptance* [illegible] an offer to dedicate does not revive the expired period in which to challenge a coastal development permit condition. Pet. App. 8a-10a. In addition, the court's opinion

addressed and rejected two other recurring theories raised in support of untimely challenges to permit conditions. The court of appeal disposed of the arguments that *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), should be applied retroactively to coastal development permits that were never timely challenged and that the opinion in *Palazzolo v. Rhode Island* 533 U.S. 606 (2001), applies in these circumstances. Pet. App. 9a-11a.

On October 20, 2004, the California Supreme Court denied Serra's petition for review.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION RESTS ON ADEQUATE STATE LAW GROUNDS.

A. This Court Has Consistently Refused to Review State Court Decisions Which Rest Upon Separate, Adequate And Independent State Law Grounds.

This Court has repeatedly stated that it has no jurisdiction to review judgments of state courts that rest upon separate, adequate and independent state law grounds. *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945); *Murdock v. Memphis,* 87 U.S. 590, 636 (1875). This rule has been applied frequently, and includes the situation in which application of a state law period of limitations for asserting a property interest would bar assertion of a federal constitutional claim. *See Paschall v. Christie-Stewart,* 414 U.S. 100 (1973).

B. The Court of Appeal's Decision Is Based on California Law Barring a Landowner from Collaterally Attacking a Permit Condition Where the Original Permittee Failed to Bring a Timely Action Challenging the Condition.

As early as 1974 it was well-established that in California a development permit condition must be challenged by way of a timely filed petition for a writ of mandate. *State of California v. Super. Ct. (Veta)* 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497 (Cal. 1974). Under California law, a claim for inverse condemnation arising from an administrative action must be filed within the same period of limitations as the administrative mandamus claim. *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 876 P.2d 1043, 1057, 32 Cal.Rptr.2d 244, 258 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). Under the California Coastal Act, an aggrieved person must file a petition for writ of administrative mandate within 60 days of the Commission's permit decision. Cal.Pub. Resources Code, § 30801. If a landowner fails to file a timely challenge, the Commission's permit decision becomes final, and the application of state law principles of res judicata and collateral estoppel renders the Commission's decision "immune from collateral attack, either by inverse condemnation action or by any other action." *Patrick Media Group,* 9 Cal.App.4th at 608, 11 Cal.Rptr.2d at 833.

Applying this rule, the California courts repeatedly have rejected collateral attacks on permit conditions, including public access conditions, where the time for properly challenging the Commission's decision has long since passed. *See Ham*, 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (rejecting collateral attack on access condition where

landowner failed to file timely challenge, complied with condition and accepted benefits of permit); *Rossco*, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (barring collateral attack on access conditions where applicant failed to timely file a challenge to conditions); *Ojavan Investors,* 26 Cal.App.4th 516, 32 Cal.Rptr. 103 (failure to timely challenge permit conditions renders them immune from collateral attack by successor in interest). The California court of appeal here relied on these cases in determining Serra's claim had no merit.

In this case, the original permittee, Adamson, never filed an action challenging the Commission's 1981 permit decision. Indeed, Adamson had suggested the condition. As a result, under uniform California law, Serra's current challenge to the 1981 permit condition is barred by the statute of limitations and doctrine of res judicata. As the court of appeal noted, "attempts to make an end run around the 60-day writ petition limitations period in Public Resources Code section 30801 do not succeed." Pet. App. 6a. The court of appeal's decision therefore was based on an independent and adequate state law ground requiring rejection of Serra's petition.

C. The Court of Appeal's Decision Is Also Based on California's Law of Waiver.

Serra's collateral attack on the 1981 permit conditions is also barred under California's waiver doctrine. Under this doctrine, a challenge to a permit condition by a landowner or its successor in interest is waived when the landowner complies with the permit condition or accepts the benefits of the permit. *County of Imperial v. McDougal*, 19 Cal.3d 505, 510-12, 564 P.2d 14, 17-18, 138

Cal.Rptr. 472, 474-75 (1977), *app. dismissed*, 434 U.S. 944 (1977). California courts frequently have applied this rule to bar collateral attacks on permit conditions. *Rossco*, 212 Cal.App.3d at 654, 260 Cal.Rptr. at 742 (waiving challenge to access condition by receiving benefits of permits and by complying with condition); *see Ojavan Investors*, 26 Cal.App.4th at 527-28, 32 Cal.Rptr.2d at 110; *City of Santee v. Superior Court*, 228 Cal.App.3d 713, 279 Cal.Rptr. 22 (1991); *Pfeiffer v. City of La Mesa*, 69 Cal.App.3d 74, 137 Cal.Rptr. 804 (1977).

Applying this state law rule, the court here determined:

> Adamson agreed to the condition imposed by the Commission and executed the [offer to dedicate], thereby accepting the benefit of the permit to expand its mobile home park within the coastal zone. Adamson did not seek judicial intervention to avoid the condition. Serra, the successor owner of the Property, is bound by Adamson's waiver of its right to seek timely writ review.

Pet. App. 5a. Consequently, California's waiver doctrine constitutes another independent and adequate state law ground requiring rejection of Serra's petition.

D. Serra Cannot Avoid the Application of These State Law Principles by Arguing That the Offer of Dedication Required by the 1981 Permit Condition Would Not Meet the Standards Contained in *Nollan*.

As one way of avoiding application of these rules, Serra suggests that the offer to dedicate is unenforceable because the requirement for public access contained in the

1981 permit condition could not meet the requirements later set out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825.

Under California law, the state courts have explicitly rejected this attempt to evade the state law of res judicata and waiver. Thus, in *Rossco Holdings* the court found that *Nollan* did not involve a situation – such as this one – where the landowner accepted and complied with the permit conditions. *Rossco*, 212 Cal.App.3d at 654-655, 260 Cal.Rptr. at 742. Similarly the court in *Ham* rejected the argument that *Nollan* prevented application of the res judicata doctrine, finding that it would not have been futile for Ham to file a challenge to the Commission's permit condition because the law at the time was not clear regarding the legality of the condition. *Ham*, 210 Cal.App.3d at 1497-1499, 258 Cal.Rptr. at 570-573.

Regardless of whether a challenge in 1981 would have been futile, "the res judicata consequences of a final, unappealed judgement on the merits [is not altered] by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.* at 1498 (*citing Reed v. Allen*, 286 U.S. 191, 201 (1932)); *see, e.g., Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1116-1117, 245 Cal.Rptr. 658, 665 (1988) ("a change in law . . . does not revive claims otherwise barred by the statute of limitations"). The federal rule on this point is the same. *Federated Department Stores v. Moitie*, 452 U.S. 394, 398-399 (1981). Consequently, even if *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) might have required a different result today, state law principles of res judicata do not

allow Serra to relitigate the validity and constitutionality of the 1981 permit condition.[1]

II. EVEN IF IT IS NOT BARRED ON INDEPENDENT STATE LAW GROUNDS, SERRA'S PETITION SHOULD BE DENIED.

Even if Serra's petition was not precluded by these independent and adequate state law grounds, the petition should be denied.

A. Serra's Petition Does Not Require the Court to Resolve a Conflict Among the Lower Courts.

First, Serra does not present any issues which require that the Court resolve a conflict among decisions of the lower courts. Both the California and federal courts addressing the issue have agreed that landowners may not collaterally attack permit conditions requiring the dedication of property long after the permit was approved and the offer of dedication recorded. *California Coastal Comm'n v. Superior Court (Ham); Rossco Holdings, Inc. v. State of California; Daniel v. County of Santa Barbara; see Leroy Land Development Co. v. Tahoe Regional Planning Agency,* 939 F.3d 696, 698-699 (9th Cir. 1991).

---

[1] Serra improperly intimates that this Court in *Nollan* struck down the Commission's entire access program and that a dedication of access is per se illegal. *See* Pet. at 2 and 3. *Nollan*, however, confirmed that regulatory agencies may exact property as conditions for development permits as long as there is a "nexus" between the impacts of the project and the permit condition. *See Nollan*, 483 U.S. at 836-837 (describing situations in which access conditions are permissible).

B. Serra's Petition Does Not Present An Important Issue of Federal Law.

Nor does Serra present an important issue of federal law. Its claim is predicated on its "dual taking" theory that the acceptance of an irrevocable offer of dedication is a second "legally distinct taking." Pet. at 11. Serra, however, does not point to any reported decision, treatise, law review article or other legal source in which this peculiar theory has ever been mentioned, much less litigated.[2] Far from raising any precedential constitutional issues, this is an eccentric action by a landowner unwilling to abide the consequences of acquiring property that it knew was subject to an irrevocable offer of dedication.

In an attempt to find support where none exists, Serra refers to the "literally hundreds of offers to dedicate various property rights coerced by the California Coastal Commission" before this Court's decision in *Nollan*. Pet. at 16. It is presumptuous for Serra to attempt to act as the spokesperson for other landowners. Unlike Serra, some landowners accepted the consequences of their voluntary decision to enjoy the benefits of their development permit in exchange for recording an irrevocable offer of dedication. Other landowners, having knowingly acquired their property subject to a recorded offer of dedication, may not see themselves as "coerced" landowners. Still others may actually support public access to the California coast, especially when they themselves will obtain the reciprocal benefits of similar access easements elsewhere in the State. That a few of these landowners eventually may

---

[2] Serra fails to mention *Daniel*, the one reported decision in which a landowner claimed unsuccessfully that an acceptance of an offer of dedication is a "taking."

raise untimely objections to the acceptance of an irrevocable offer of dedication to avoid their legal obligations does not elevate Serra's claim to the level of an important federal issue, especially when these claims are premised on a mistaken view of California real property law. *See ante* at IIC.

Finally, Serra argues that the Court should grant the petition because landowners have "little incentive" to contest the initial offer of dedication, thereby encouraging governments to use the offer of dedication "scheme" to circumvent the requirements of *Nollan*. Pet. at 17. According to Serra, a takings challenge to an offer of dedication would be dismissed because it is unripe and because of the remote possibility that such an offer will ever be accepted. *Ibid.* This assertion is not credible. Cases such as *Hensler*, *Ham, Rossco*, and *Patrick Media* for years have provided landowners notice that they are legally required to bring a challenge to a permit condition when the condition is first imposed, and cases such as *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 74 (1994), give the permittee every incentive to challenge the imposition of the original permit condition if government oversteps its authority. Notwithstanding Serra's unsupported claims, there is no reason to create a new constitutional rule that would allow landowners to challenge the acceptance of irrevocable offers of dedication many years after they have accepted permit conditions and enjoyed the benefits of the permit. *See Leroy Land Development Co.*, 939 F.3d at 698-699 (challenge to settlement agreement imposing conditions of development five years after execution, based on a subsequent takings analysis articulated in *Nollan*, rejected because it " . . . would inject needless uncertainty and an

utter lack of finality to settlement agreements of this kind").

C. Serra's Taking Claim Is Without Merit.

In any event, Serra's underlying taking claim is meritless, even putting aside that it is barred by res judicata and waiver. Serra's claim that the Conservancy's acceptance of an irrevocable offer of dedication constitutes a separate compensable taking is founded on a mistaken understanding of the property "right" retained by a landowner after the landowner has recorded an irrevocable offer of dedication. As Serra properly concedes, the property interest claimed to be taken must be measured by state real property law. Pet. at 9. In Serra's unique view of California law, the landowner has a "legally distinct" interest for which he may assert a taking claim after an offer of dedication is accepted. Pet. at 9, 11.

There are at least two problems with this argument. First, Serra's theory that the Conservancy's acceptance of an irrevocable offer of dedication is a separate taking is based on its misreading of California real property law. Once the landowner records an irrevocable offer of dedication, it has conveyed away the right to exclude the public should the irrevocable offer ever be accepted and opened to the public. In this case, for example, the irrevocable offer granted by Serra's predecessor states that:

> This Offer shall run with and burden the Property and all obligations, terms, conditions, and restrictions thereby imposed shall be deemed to be the covenants and restrictions running with the land and shall be effective limitations on the use of the Property *from the date of recordation of [the offer] and shall bind [Adamson] and all*

> *successors and assigns for a period of twenty-one (21) years.*

Emphasis added; Vol. 1, Clerk's Transcript ("CT"), at 135, lns. 20-25. The offer of dedication additionally provides:

> This *irrevocable* offer shall be binding upon the owner and the heirs, assigns, or successors in interest to the Property . . . for a period of twenty-one (21) years. Upon *recordation of an acceptance of this offer by the grantee . . . this offer shall have the effect of granting fee title to the grantee of the Property.*

Emphasis added; Vol. 1, CT at 136, lns. 9-14.

Therefore, although the landowner may have the qualified right to exclude others while the irrevocable offer of dedication is outstanding, the right is subject to immediate extinction once the agency accepts the offer. A public agency's acceptance of the irrevocable offer of dedication is not a taking of a landowner's property right; it is the public's exercise of a right that the landowner explicitly conveyed away when it made the irrevocable offer of dedication. *See*, e.g., *Ojavan Investors*, 26 Cal.App.4th at 528, 32 Cal.Rptr. at 110 (finding that prior landowner had waived right to challenge deed restrictions by having accepted the benefits of the permit and that current landowner can take "only the title [the prior owner] had and subject to prior recorded instruments").

As the Ninth Circuit found in *Daniel*, under both federal and California law, an irrevocable offer of dedication is akin to an option, and the taking of an option occurs when the option is granted, not when it is exercised. *Daniel*, 288 F.3d at 383; *see Palo Alto Town and Country Village, Inc. v. BBTC Co.*, 11 Cal.3d 494, 502, 521 P.2d

1097, 1102, 113 Cal.Rptr. 705 (1974) (the making of an option is an "irrevocable offer"); *Warner Bros. Pictures v. Brodel*, 31 Cal.2d 766, 772, 773, 192 P.2d 949, 952 (1948), *cert. denied*, 335 U.S. 944 (1948) (an "option contract gives the optionee a right against the optionor for performance of the contract . . . which the optionor cannot defeat by repudiating the option"). Thus, when the Conservancy accepted the irrevocable offer, the Conservancy's action took nothing from Serra "that had not already been taken." *Daniel*, 288 F.3d at 383. The California authority upon which Serra relies concerns *revocable* offers of dedication, not irrevocable offers, Pet. at 9-10, and simply highlights that Serra's taking claim is entirely dependent on having this Court reach a different conclusion about the California law of property dedication.[3]

Second, based on California law, the court of appeal concluded that Serra's taking claim was founded on a challenge to the original permit because:

> No matter how the action is styled, it remains a collateral attack on a decision that has been final for two decades. The current claim derives solely from the Commission's 1981 permit condition, not from the formalities involved in enforcing that condition. The derivation is plain from an

[3] Serra also relies on *Grupe v. California Coastal Comm'n*, 166 Cal.App.3d 148, 213 Cal.Rptr. 578 (1985) to support its dual taking theory. Pet. at 9-11, 13. In *Grupe*, the court upheld the Commission's imposition of a condition requiring the developer to make an offer of dedication to mitigate the impacts of his project. The court recognized the contingent nature of the residual "rights" of the landowner and that the landowner's ability to exclude existed only "*until such time as a public agency or private association agrees to accept the offer and concomitant responsibility to police the beach.*" *Grupe*, 166 Cal.App.3rd at 170, 212 Cal.Rptr. at 592 (emphasis added).

> examination of Serra's first amended complaint, which alleges that the Commission's OTD condition bears no relationship to the expansion of Adamson's mobile home park, seven miles distant from the Property.

Pet. App. 7a-8a. Given Serra's pleading, the court of appeal properly concluded that Serra's takings claim was not directed solely at the Conservancy's acceptance of the offer of dedication. *See Ojavan*, 26 Cal.App.4th at 524-525, 32 Cal.Rptr. at 108-109; *Rossco,* 212 Cal.App.3d at 660, 260 Cal.Rptr. at 746.

Finally, the determination that the acceptance of an irrevocable offer is not a taking accords with this Court's views in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). In *Lucas*, decided five years after *Nollan*, this Court acknowledged that "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas*, 505 U.S. at 1028-29. Under California real property law, the recording of an irrevocable offer of dedication is a preexisting limitation on title that extinguishes any right to exclude the public once the irrevocable offer is accepted.

D. Serra's Ripeness Argument Is Without Merit.

Serra's concurrent assertion that its taking claim was not ripe until the Conservancy accepted the permit, Pet. at 14, fails for the same reason that it fails on the merits. Again, Serra's argument ignores that California law requires that any challenges to permit conditions, including constitutional challenges, must be brought within the time period for challenging the underlying administrative action. *See Hensler*, 8 Cal.4th at 22, 32 Cal.Rptr. at 257-258;

Ham, 210 Cal.App.3d at 1493, 258 Cal.Rptr. at 568; *Rossco*, 212 Cal.App.3d at 657, 260 Cal.Rptr. at 744. As the lower courts found here, Serra's attack on the Conservancy's acceptance of the offer of dedication was an attack on the original permit condition and, as in the *Nollan* case itself, any taking claim was ripe at the time that the condition was first imposed in 1981, not decades later.

Moreover, the acceptance of an irrevocable offer of dedication can never constitute a taking because, as discussed, once a landowner records an irrevocable offer of dedication, it irrevocably conveys any right to exclude the public if the offer of dedication is accepted. When the Conservancy accepted Adamson's original offer of dedication, it simply exercised the property interest that Serra's predecessor had irrevocably conveyed to the public, and that Serra has no property interest to prevent. Because a taking claim based on the acceptance of such an offer does not exist, it is pointless to consider when such a claim might "ripen."

Serra also appears to suggest its ability to attack the 1981 permit condition was somehow resurrected by this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606. *Palazzolo* indicated that a transfer of title does not necessarily bar a taking claim, even though the new owner acquires the property with knowledge of an existing regulation. *Palazzolo*, however, did not eliminate the statute of limitations for taking claims, nor did it allow a subsequent landowner to assert a taking claim that the predecessor had already lost before the transfer. As the court of appeal correctly held in this case, Serra's predecessor did not file a taking claim before the limitations period expired, but instead complied with the offer of dedication condition and accepted the benefits of the

permit. Therefore, Serra acquired the property subject to an explicit recorded offer of dedication in which the prior landowner conveyed away the very property interest at stake – the right to exclude the public from the property. *Palazzolo* did not revive taking claims that had expired long before the new owner acquired the property.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Dated: April 8, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
MANUEL MEDEIROS
State Solicitor General
TOM GREENE
Chief Assistant Attorney General
J. MATTHEW RODRIGUEZ
Senior Assistant Attorney General
JOHN A. SAURENMAN
Supervising Deputy Attorney General

ROSANA MIRAMONTES
Deputy Attorney General
Counsel of Record

Counsel for Respondents